**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Empowering Broadband Consumers Through Transparency | ) | CG Docket No. 22-2 |
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# COMMENTS OF AT&T


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AT&T Services, Inc., on behalf of itself and its affiliates (collectively, "AT&T"), submits these comments in response to the Federal Communications Commission's ("Commission") notice of proposed rulemaking[1] on broadband "nutrition labels."

## INTRODUCTION

Section 60504 of the Infrastructure Investment and Jobs Act requires the Commission to issue rules adopting "broadband consumer labels," modeled after FDA nutrition labels, that give consumers basic information about broadband internet access service plans that they are considering purchasing. AT&T appreciates the opportunity to comment on the content and design of the new labels. AT&T has substantial experience both with the existing transparency rule disclosures and with how consumers engage with the types of information at issue here.

As an initial matter, the Commission should recognize that providers already have strong, marketplace incentives to transparently provide consumers information regarding the rates, terms, conditions, network management practices, and performance of their services, and thus convey the value those services offer to consumers. Indeed, broadband providers already compete to effectively communicate the benefits of their offers to consumers, and to differentiate

[1] Notice of Proposed Rulemaking, *Empowering Broadband Consumers Through Transparency*, CG Docket No. 22-2 (released January 27, 2022) ("*Notice*").

them from those of their competitors. Consumers thus already have a wealth of information to make informed decisions about which services will best meet their individual needs. Nonetheless, appropriately crafted, government-mandated labels could provide greater consistency in labelling and transparency across providers, and thus assist consumers in comparing plans offered by different providers. At the same time, such labels should not deprive providers of the flexibility to differentiate their services from others, as well as to convey to existing and potential subscribers the benefits of their differentiated service offerings. Nor should the labels burden consumers with unnecessary and/or confusing information, or impose excessive burdens and costs on providers.

To ensure that the labels are the most useful to consumers, the Commission should keep a laser focus on the purpose of those labels. The labels are intended to help consumers make informed choices about which broadband service plan to purchase at the point of sale. The information on the labels, therefore, should be clear and concise. The labels should provide information that customers consider relevant to the purchasing decision, but they should not include extraneous data that is not familiar or useful to consumers. And they should allow providers to differentiate their services competitively without being administratively burdensome.

To that end, AT&T agrees with the Commission's proposal to adopt both the content and format of the fixed and mobile broadband labels adopted in 2016, with a few modifications and clarifications. With respect to pricing information, the Commission should recognize that a simple FDA-style "nutrition label" cannot adequately capture all of the plans that broadband providers offer. Accordingly, the Commission should permit providers to publish basic rate information on their labels with links to their websites where consumers can obtain more

complete information about that provider's options. The Commission should also give providers the flexibility to add explanations and context on the label to ensure that consumers do not get an inaccurate impression from rate information that is overly simplistic.

With respect to network performance information, the Commission should not require mobile providers to report speed and latency data based on "peak" usage times. As explained below, "peak" usage has no real meaning that would be useful to consumers, because the peak usage times vary greatly from location to location, and often even day-to-day (*e.g.*, weekends versus weekdays). Instead, the Commission should require all mobile providers to report the 25th and 75th percentile speeds and latency measurements based on 24-hour averages. The Commission also should not require fixed or mobile providers to include packet loss information on their labels. Consumers do not consider packet loss relevant to their purchasing decisions; indeed, most consumers have no idea what packet loss is or how to interpret the measurements, and thus could be confused or misled by such data. Collecting packet loss data would be very burdensome for providers, but would provide no appreciable benefit to consumers who are trying to use the labels to order service.

The Commission should also require labels only for currently offered services at the *point of sale*. That means that the Commission should not require labels for grandfathered services that are no longer currently available for sale. Consumers do not need information about services they can no longer buy. Moreover, publishing such labels would be burdensome for providers; AT&T alone has hundreds of grandfathered fixed plans and thousands of grandfathered mobile plans, many of which have very few remaining customers. For similar reasons, Section 60504 does not authorize direct notifications of changes in the labels to existing customers that are not shopping for new plans. Such notifications would be administratively

burdensome and are far more likely to confuse and cause unnecessary concerns among customers – driving costly calls to customer care representatives, or long in-store discussions with store representatives – than they are to provide any useful information. And the Commission should require the labels always to be made available *digitally*. Hardcopy or device packaging labels will be infeasible in most cases, and are much more likely to become stale and out-of-date than digitally available labels.

In Section I below, we begin by explaining that Section 60504 does not require the Commission to adopt the exact labels adopted in 2016, but instead allows the Commission to adopt them today with modifications. In Section II, we explain that the Commission should adopt the 2016 labels with certain modifications and clarifications to the pricing, speed, and latency data, and it should not require packet loss data. In Section III, we explain that the Commission should not require labels for grandfathered services or direct notifications to existing customers, and it should require digital access to the labels at the point of sale.

## I. SECTION 60504 DOES NOT REQUIRE THE COMMISSION TO ADOPT THE 2016 LABELS WITHOUT MODIFICATION, BUT THE FIRST AMENDMENT REQUIRES THE COMMISSION TO INTERPRET ITS SECTION 60504 AUTHORITY NARROWLY.

Section 60504 of the Infrastructure Investment and Jobs Act requires the Commission to "promulgate regulations to require the display of broadband consumer labels, as described in the Public Notice of the Commission issued on April 4, 2016 (DA 16–357), to disclose to consumers information regarding broadband internet access service plans."[2] At the outset, the Commission seeks comment on the parameters of this requirement, including "the extent to which the Infrastructure Act requires or permits the Commission to depart from the labels described in the

[2] The Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60504(a) (2021) ("Infrastructure Act").

*2016 Public Notice*."[3] Congress plainly did not intend to hamstring the Commission into re-adopting the exact labels contained in the *2016 Public Notice*. Several aspects of the statutory language confirm this reading.

First, if Congress had intended to codify the 2016 labels themselves (as then adopted), it could have done so explicitly. Instead, Congress delegated the matter to the Commission, instructing it to use its rulemaking authority to promulgate regulations requiring the display of labels "as described" in the *2016 Public Notice*. The phrase "as described" in this context is best read to mean "of the type described," which preserves the Commission's ability to use its rulemaking discretion to modify the 2016 labels to tailor them to the agency's current understanding of marketplace facts and conditions. In that respect, the Commission's own *Notice* appropriately treats the 2016 labels as the starting point,[4] but not necessarily the endpoint, for the labels Section 60504 requires.[5]

Second, Section 60504(c) provides that, "[i]n issuing the final rule under subsection (a)," the Commission must hold a series of public hearings to determine "*at the time of the proceeding*" how consumers evaluate broadband internet access plans and whether disclosures of information about such plans are available, effective, and sufficient.[6] The "proceeding," presumably, refers back to the beginning of the sentence – *i.e.*, the rulemaking proceeding to "issu[e] the final rule under subsection (a)." Accordingly, it seems clear that Congress wanted

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[3] *See Notice* ¶¶ 12-13.

[4] *See id.* ¶ 17 (proposing to work from the 2016 labels "because Section 60504 . . . directs us to *begin our inquiry* there" (emphasis added)).

[5] *See also, e.g., id.* ¶ 14 (proposing to adopt the 2016 labels "subject to appropriate modifications"). The only thing the label *must* have is information regarding whether an offered price is an introductory rate, and if so, what rate the consumer will pay after the introductory period. Infrastructure Act § 60504(b)(1).

[6] Infrastructure Act § 60504(c) (emphasis added).

the Commission to investigate conditions "at the time of the proceeding" so that it could, if appropriate, modify the 2016 labels to take account of its new findings. The existence of subsection (c) would make little sense if the statute required the Commission to adopt the 2016 labels without change.[7]

Third, the nature of the Commission's rulemaking authority further confirms this conclusion. The statute specifies that the labels are to be required by Commission regulations. Once the initial regulations are adopted, however, the Commission clearly has authority to conduct further rulemakings in the future to *modify* those regulations to change the information required on the labels. But if the Commission can modify the Section 60504(a) regulations in the future, there is no logical reason why the Commission cannot take current circumstances into account to modify the 2016 labels in the initial rule. The statute invokes the Commission's rulemaking authority, which inherently provides the agency a degree of discretion when implementing statutory standards and commands.[8]

In addition, nothing in Section 60504 excepts the new labelling requirement from application of the Paperwork Reduction Act.[9] Indeed, when Congress wants to exempt a provision from the Paperwork Reduction Act, it does so explicitly – as it did with respect to other provisions within the Infrastructure Act itself.[10] Consistent with this reading, the Commission

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[7] *See Notice* ¶ 13.

[8] *See, e.g., Texas Off. of Pub. Util. Couns. v. FCC*, 183 F.3d 393, 443–44 (5th Cir. 1999) (likening the Commission's rulemaking authority under Section 154(i) to a "'necessary and proper' authority").

[9] Paperwork Reduction Act of 1995, Public Law 104-13.

[10] *See, e.g.,* Infrastructure Act § 60102(h)(2)(E)(ii) (expanding the exemption from the Paperwork Reduction Act in Section 806(b) of the Communications Act of 1934 (47 U.S.C. 646(b)) from "the initial rule making required under section 802(a)(1)" to "any rule making or other action by the Commission required under this title").

acknowledges in the *Notice* that the new labels must be submitted to the Office of Management and Budget ("OMB") for approval under that Act.[11] As discussed more fully below, however, OMB ultimately declined to approve the 2016 labels to the extent they required information about packet loss for mobile services. Since Congress retained the Paperwork Reduction Act requirements for Section 60504, this further reinforces that Congress did not intend for the Commission to re-impose the literal 2016 labels as adopted in the *2016 Public Notice*.

Finally, Section 60504 must be interpreted narrowly to mitigate First Amendment concerns. Indeed, Section 60504 raises greater First Amendment concerns than the original 2016 labels. Under the *Notice*, the Commission proposes to *require* providers to publish the new labels in the format adopted by rule,[12] whereas the 2016 labels acted merely as a "voluntary safe harbor" for compliance with the transparency rule's requirement to disclose information to consumers.[13]

The Commission does not have unbounded authority to mandate prescribed labels under the First Amendment. Even if the more lenient *Zauderer* standard governing commercial speech applies,[14] the Supreme Court has made clear that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial

[11] *See Notice* ¶ 41; *see also id*. ¶ 33.

[12] *See id.* ¶ 16; *see also* Infrastructure Act § 60504(a) ("the Commission shall promulgate regulations to *require* the display of broadband consumer labels" (emphasis added)).

[13] *See* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet,* GN Docket No. 14-28, 30 FCC Rcd 5601, ¶ 179 ("*2015 Order*") ("we are therefore establishing a voluntary safe harbor for the format and nature of disclosure to consumers"); *see also id*. ¶ 181.

[14] *See* Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, WC Docket No. 17-108, 33 FCC Rcd 311, ¶ 235 (2017) ("*2017 Order*") ("[w]e recognize that there remains some debate regarding the application of *Zauderer*, as opposed to the *Central Hudson* framework that generally governs First Amendment review of commercial speech regulation").

speech."[15] The Commission must tread carefully when considering *forcing* broadband providers to publish specified information in pre-determined formats that the broadband providers themselves believe to be confusing to customers, or so over-simplified that they have the potential to be misleading. The First Amendment therefore strongly counsels in favor of interpreting the Commission's authority under Section 60504 narrowly. With respect to these mandatory labels, less will generally be more – *and* more likely to be constitutional.

## II. THE COMMISSION SHOULD RE-ADOPT THE 2016 LABELS WITH A SMALL NUMBER OF MODIFICATIONS AND CLARIFICATIONS.

AT&T agrees with the Commission's fundamental proposal to re-adopt both the content and the format of the 2016 labels (as represented in the *Notice*'s Appendices B and C), as long as the Commission adopts a few modifications and clarifies how providers are to calculate and represent certain information.[16] At the outset, it is important to reiterate two overarching principles that should guide the Commission's design of these labels. First, the purpose of these labels is to help consumers choose a broadband plan at the point of sale. The Commission should ensure that the labels are properly tailored to that purpose by presenting information that consumers will find useful in picking a broadband service. Consumers today choose broadband plans overwhelmingly on the basis of price and speed.[17] The labels should focus on presenting

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[15] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Under the more stringent *Central Hudson* framework that generally governs commercial speech regulation, the regulations must be no more extensive than necessary to further a substantial governmental interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563-64 (1980); *see also 2017 Order* ¶ 238 (finding that the existing transparency rule is no more extensive than necessary under *Central Hudson* in part because the "most significant concerns were raised with respect to the additional reporting obligations adopted in the [*2015 Order*] and here we eliminate those requirements in favor of a rule consistent in scope with the 2010 transparency rule").

[16] *See Notice* ¶¶ 16-17, 23-24.

[17] *See Notice* ¶ 15.

information relating to those factors in ways that consumers will understand, rather than cluttering the label with more extraneous information that consumers are unlikely to find helpful in selecting a broadband service that will meet their needs.[18] In that regard, as explained below, the Commission should not include packet loss, peak usage, or geographically specific performance information in either the fixed or mobile labels.

Second, implementing mandatory labels requires an appropriate balance between standardization and flexibility. There is a real risk that forcing providers to present simple numbers in boxes, as if they were reporting how many grams of niacin were in the product, will over-simplify the information at issue to a degree that is confusing or even misleading to consumers. Accordingly, the Commission must strike a balance. On the one hand, the Commission should clarify how broadband providers are to calculate and present certain items on the label, to facilitate apples-to-apples comparisons for consumers to the maximum extent feasible. On the other hand, however, the Commission must allow providers the flexibility to add explanations and context where appropriate, particularly as it relates to price information, so that consumers do not get a misleading impression from a quick glance at a number.

For these reasons, the Commission should adopt the 2016 labels with the following modifications and clarifications:

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[18] In adopting a voluntary safe harbor for disclosures to consumers, the Commission directed its Consumer Advisory Committee to develop and recommend a format that was "clear and easy to read – similar to a nutrition label – to enable consumers to easily compare the services of different providers," and that "addresses provider compliance burdens while ensuring the utility of the disclosures for consumers." *2015 Order* at ¶ 179; *see also id.* at ¶ 180 (cautioning that any standard format of disclosure for mobile broadband should "allow providers to continue to differentiate their services competitively," and not be "administratively burdensome"). The Commission further acknowledged that the labels were not intended to take the place of (and thus to include) the more detailed disclosures required under its transparency rules for purposes other than enabling consumers to compare the services of different providers, and thus to make informed decisions about whether to buy a particular service.

*Price*. The Commission must grapple with the basic reality that one simple label of the type proposed cannot even begin to incorporate the full range of a broadband provider's plan offerings and prices. The Commission recognized this problem even when it originally referred the design of these labels to the CAC in the *2015 Order*, when it noted with respect to mobile broadband in particular that the CAC would have to "consider whether and how a standard format for mobile broadband providers will allow providers to continue to differentiate their services competitively, as well as how mobile broadband providers can effectively disclose commercial terms to consumers regarding *myriad plans in a manner that is not administratively burdensome*."[19] The original 2016 labels address this problem in part by envisioning that the labels provide only certain basic information about plans and their prices, with links to the provider's website to provide more complete information about the full range of prices and available terms, including promotional offers and plans that bundle broadband with other services.

The Commission could address this issue in one of two ways. It could require providers to publish one label that provides the prices only for the most popular set of plans available for sale and includes links to all of the provider's other generally available mass market offerings. This is arguably what the 2016 labels envision: for example, the mobile broadband label in Appendix C of the *Notice* has separate lines and links for "other included services/features" and "additional pricing options, plans, and promotions." If the Commission wants the labels to cover a provider's offerings more comprehensively, the Commission would have to permit providers to create and publish multiple fixed and mobile labels, each of which could focus on a "family" of similar offerings (such as unlimited, capped, data-only, and the like). Even these multiple labels,

[19] *2015 Order* ¶ 180 (emphasis added).

however, could only offer basic pricing information, with clearly marked links to more complete information about options and terms.

Another complication with the 2016 labels' "number-in-a-box" methodology is that many of today's mobile broadband plans may have a different price-per-line depending on how many lines the customer purchases with her plan (or how they mix and match plans). The Commission should thus give providers flexibility in deciding how to present the price-per-line for such plans in the label's "box" while making clear that the prices can vary depending on the number of lines and providing a link for more complete information.[20] Such flexibility is necessary to permit providers to present their information in ways that permit direct comparisons without over-simplifying in ways that could leave a misleading impression.[21]

*Speed and Latency*. With respect to the mobile broadband labels, the Commission should not require providers to report "typical" speeds or latency at "peak" usage times. "Peak" usage has no real meaning in mobile networks, and consumers would find median measurements more useful.

"Peak usage" is not a well-defined metric for mobile networks. For mobile networks, "peak usage" periods vary substantially from location to location. For example, in downtown

[20] For example, a provider should have the flexibility to decide whether to present the price-per-line in the label's "box" for a one-, two-, three-, or four-line plan, while making clear that the customer can get more information via the link. The major providers today all have very user-friendly websites that provide information about plans, pricing, and terms that are more interactive than the label's simple box and allow consumers to determine which plan configuration among the "myriad plans" and options available would work best for them.

[21] Similarly, the Commission should not *require* providers to include bundled offerings in the labels, *see Notice* ¶ 19, because that would unduly increase the complexity of the labels for both consumers and providers. But providers should have the flexibility to mention bundled offerings where appropriate. For example, some of AT&T's unlimited mobile data plans include HBO Max, and providers should have the flexibility to note the existence of such bundled offerings on the label.

areas, peak usage tends to be during the late morning to the late afternoon rush hour, while, in residential areas, peak usage tends to be later in the evening, although these tendencies vary from place to place and may have changed under COVID. Consequently, determining peak usage for every area would be extremely burdensome in itself. Doing so would require studies of every geographic area to determine peak usage times for each area, and then drive testing during those times to collect sufficient information to develop average speed and latency during those times.

Today, AT&T reports mobile broadband speeds on its broadband information page based on the 25th and 75th percentile 24-hour national averages for both download and upload speeds.[22] AT&T also reports latency based on 25th and 75th percentile speeds.[23] Other providers report this information on a similar basis. The Commission should require all providers to include speed and latency information in this format, which will be more useful for consumers and also facilitates apples-to-apples comparisons. In making these calculations, the Commission should allow carriers to use their own performance measurement platforms, tools, and third-party sources and should not mandate any specific application and system. In addition, performance measurements should be measured within the carrier's network between customer

[22] *See* AT&T Broadband Information page ("Based on data compiled by AT&T through crowd-sourced speed tests, AT&T expects customers will typically experience the following speeds, subject to location, device, and other factors as discussed above (the range reported is based on the 25th to the 75th percentile, which means that the 25th percentile lower bound is the value below which 25% of the test readings were, and the 75th percentile upper bound is the value below which 75% of the test readings were)").

[23] *See* AT&T Broadband Information page ("Based on data compiled by AT&T through crowd-sourced performance tests, AT&T expects customers will typically experience the following latency, subject to location, device, and other factors as discussed above (the range reported is based on the 25th to the 75th percentile, which means that the 25th percentile lower bound is the value below which 25% of the test readings were, and the 75th percentile upper bound is the value below which 75% of the test readings were)")

premises/device and the provider's closest public Internet gateway that has an active interface to a major Internet Autonomous System Number (ASN).

*Packet Loss*. The Commission's proposal to adopt the 2016 labels apparently includes a requirement to provide packet loss data for both fixed and mobile broadband services.[24] The Commission should not include packet loss on the new labels. Indeed, even in 2016, OMB declined to approve the 2016 mobile broadband label to the extent it required packet loss information.[25] OMB found that, before attempting to renew the authorization for the mobile broadband label, the Commission would have to perform studies to, among other things, "assess . . . the practical utility of packet loss as it relates to mobile performance."[26] The *Notice* contains no such assessment.

The truth is that packet loss is not a useful measure for consumers of either fixed *or* mobile broadband performance, and it would be costly and burdensome to collect such data. The Commission has never offered a good reason to include packet loss data in the broadband labels, and the *Notice* offers none.[27] The vast majority of consumers have no idea what packet loss is

[24] *See Notice* ¶ 16 (proposing to adopt the 2016 labels "as reflected" in Appendices B and C, each of which includes packet loss).

[25] Notice of Office of Management and Budget Action, OMB Control No. 3060-1220 (approved Dec. 15, 2016), *available at* https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201612-3060-012 ("at this time, packet loss will not be a required performance metric for mobile disclosure").

[26] *Id*.

[27] The original *2015 Order* merely included a footnote that cited comments from AARP and others arguing vaguely that "packet loss could be useful to consumers." *2015 Order* ¶ 166 n.407; *see also 2017 Order* ¶ 226 (finding lack of record support for the utility of this "esoteric" metric).

and would not know how to interpret the information.[28] In fact, contrary to what consumers may think, low packet loss could be an indication of *slow* network performance.

The reason is that packet loss implicates certain trade-offs in the way broadband networks are engineered. The principal means a provider has for reducing packet loss is to use larger buffers in its routers. The larger the buffer, however, the longer the queue in which packets must wait for delivery to their next destination (and the slower the service).[29] Thus, there is a trade-off between reduced packet loss and the speed at which packets are transmitted through the network. Given these trade-offs, lower packet loss does not necessarily mean better performance. Increasing buffer size to mitigate packet loss will result in higher network delay, which could have a large adverse effect on delay intolerant applications (such as frozen frames for significant periods of time).[30]

Packet loss would also be costly and burdensome to collect. For its mobile broadband network, AT&T would have to collect packet loss information using "drive testing" since packet loss statistics are not available from some commonly used third party crowd-sourcing applications. Such drive testing represents a substantial cost, involving about 30 vehicles taking measurements in areas covering more than 90 percent of the U.S. population. Once collected, engineers must also analyze and verify the data before IT professionals place the information on

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[28] *See 2017 Order* ¶ 226 ("[a]fter all, consumers have little understanding of what packet loss means").

[29] The size of the buffer is an important design parameter because there is an inverse relationship between the size of the buffer and the speed at which packets reach their destinations. A larger buffer means longer queues for packets before they are sent to their next destination. A smaller buffer means smaller queues for packets before they are sent to their next destination.

[30] Indeed, a requirement to report packet loss metrics could have *adverse* unintended consequences. If consumers actually used the reported packet loss statistics to choose service providers, providers would have incentives to increase router buffers to reduce packet loss, even though such practices would likely result in slower and less optimized internet routing systems.

the AT&T website containing AT&T's transparency disclosures. To add packet loss data to this process, AT&T would either have to install new equipment in all of its vehicles, or install new software in its existing equipment (which would require a significant increase in the amount of drive testing conducted to collect the same amount of data). Adding packet loss data would also necessitate a significant increase in the amount of time engineers and IT professionals must devote to analysis, verification, and uploading the data.

As noted above, OMB has already found that including packet loss information in mobile providers' prior, safe-harbor labels could not pass muster under the Paperwork Reduction Act. Therefore, the Commission clearly has no lawful basis to adopt a *mandatory* label requiring all mobile providers to offer this information, given that the *Notice* makes no attempt to answer OMB's concerns. Similarly, as noted above, mandatory labels in pre-determined formats raise more serious First Amendment concerns than the prior safe-harbor labels, and the Commission should not force fixed *or* mobile broadband providers to publish this information, which most broadband providers believe to be not just unnecessary but potentially confusing to consumers. If there are consumers that really want packet loss information, third parties already make such information publicly available.[31] The Commission should not try to re-impose those requirements here.

*Affordable Connectivity Program*. The Commission should require information about the Affordable Connectivity Program ("ACP") to be provided solely through a link to another site.[32] The label should alert the consumer in concise language that such options are available with a

[31] For example, packet loss data is publicly available from several Internet sites including speedtest.net, pingtest.net, dslreports.com, freeola.com, and megapath.com (and it is currently provided by the FCC's MBA applications).

[32] *See Notice* ¶ 21.

link to more comprehensive information.[33] ACP discounts interact with standard rates in ways that are far too complex to represent on the broadband labels.

## III. THE COMMISSION SHOULD STRICTLY LIMIT THE BROADBAND LABELS TO INFORMATION REGARDING SERVICES AVAILABLE AT THE POINT OF SALE AND TAKE OTHER STEPS TO PROMOTE EASE OF USE.

The *Notice* seeks comment on a variety of other issues relating to the scope and real-world implementation of the labeling requirement. As to all of these issues, the Commission should (1) strictly limit the labeling obligations to currently available services offered at a point of sale, and (2) err on the side of making the labels as easy to use and implement for consumers and providers as possible.

### A. The Commission Should Not Require Labels for Grandfathered Services.

The *Notice* seeks comment on whether the new labels should cover "plans that are not currently available for purchase by consumers, such as legacy or grandfathered plans labels."[34] They should not.

First, the authority in Section 60504 to adopt labels does not extend to grandfathered services. This is because Section 60504, by its plain terms, keys that authority to the labels "as described" in the *2016 Public Notice*. The *2016 Public Notice*, in turn, grew out of a special referral by the Commission to the CAC to develop labels that would function as a safe harbor for compliance with the transparency rule's requirement that broadband providers provide information to consumers.[35] And it is well-settled that the transparency rule's requirement is

[33] For example, the label could include language such as "The Affordable Connectivity Program (ACP) is a federal program to help eligible households pay for internet. Go to att.com/acp for more details," or "AT&T offers several options that can help eligible households pay for internet service. Go to att.com/acp for details."

[34] *Notice* ¶ 15.

[35] *2015 Order* ¶¶ 179-81.

focused on providing information to consumers *at the point of sale – i.e.*, providing information to consumers that would allow them to make informed choices about which service to purchase.[36] Section 60504 thus provides no authority to require broadband providers to make and publish labels for services that, by definition, are not currently offered at any point of sale.

Moreover, requiring labels for grandfathered services would represent a massive expansion of the labelling regime that would be both unnecessary and extremely burdensome. Such labels would be unnecessary because they would do nothing to further the purpose of the labels, which is to help consumers pick a plan at the point of sale. Consumers trying to pick a new plan would obviously have no reason to peruse the labels of services that they can no longer purchase. Similarly, individual customers have easy access to their own bills and experience with the performance of their existing plan, and thus have information about rates, terms, and performance of their existing plan, which will allow them to compare their current plan with the plans they are considering purchasing. Labels for grandfathered plans would thus serve no useful purpose.

On the other hand, broadband providers would find it costly and burdensome to comply with a requirement to maintain and publish labels for grandfathered plans. AT&T has more than 300 grandfathered fixed broadband plans, and more than 7,000 grandfathered wireless broadband plans. These plans can date back years, and thus a substantial percentage of these plans have very few remaining users today.[37] Requiring providers to create labels for grandfathered plans

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[36] *2015 Order* ¶ 157; *see also id*. ¶ 176.

[37] For example, approximately half of AT&T's hundreds of grandfathered fixed broadband plans have ten or fewer customers. AT&T has thousands of mobile broadband plans that have been grandfathered for years, and of those old plans, there are more than 5,000 plans that have a combined *total* of approximately 19,000 customers remaining (i.e., approximately four customers per plan).

would therefore represent an exponential increase in the number of labels providers would have to create and make available – all for no appreciable benefit to consumers.

### B. The Commission Should Not Adopt a Direct Notification Requirement for Current Customers for Changes to the Labels.

The *Notice* asks whether Section 60504 gives the Commission authority to "adopt a direct notification requirement for current customers for changes to terms in the labels after their initial display."[38] It does not.

As a statutory matter, the labels authorized by Section 60504 are completely separate from, and have nothing to do with, direct notifications to existing customers. As discussed above, Section 60504, by its plain terms, keys the authority to adopt labels to the *2016 Public Notice*. The *2016 Public Notice*, as discussed above, relates only to the transparency rule's requirement of providing information to consumers *at the point of sale*.[39]

In the *2015 Order*, the Commission separately adopted a new requirement that broadband providers notify existing customers if their individual use would trigger a network practice that might have a significant impact on their usage of the service.[40] The Commission noted that this new direct notification requirement was distinct from the existing rule, which required "the disclosure of relevant information at the point of sale."[41] The Commission adopted this direct notification requirement in a portion of the *2015 Order* separate from the adoption of the labels.[42] The new direct notification requirement took effect immediately, independent of the

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[38] *Notice* ¶ 22.

[39] *2015 Order* ¶ 157; *see also id*. ¶ 176.

[40] *Id.* ¶ 171. The Commission repealed that requirement in 2017.

[41] *Id.* ¶ 171.

[42] Compare *id*. (adopting direct notification requirement) with *id*. ¶¶ 177-81 (adopting safe-harbor labels).

referral of the design of the labels to the CAC, which ultimately resulted in the *2016 Public Notice* referenced in the statute. Accordingly, this history reinforces that the statutory authority to adopt labels does not encompass an authority to impose direct notification requirements with respect to existing customers who are not making decisions at a point of sale.

Moreover, any attempt to incorporate such mid-course notifications into this *labelling* regime would be both unnecessary and burdensome. AT&T already notifies customers of material adverse changes in their service, including changes in coverage and pricing impacting them. AT&T notifies impacted customers today by bill message, mail, email (when available), or SMS (when available). Any changes to other items on the broadband label, such as latency, would have less impact on a customer and thus should not require a notification. Most items involving network performance, including Expected vs Actual Download/Upload Speed and Latency, are already available to customers. Accordingly, there is no reason to require providers to send existing customers updated broadband labels, which are designed for use at the point of sale, whenever the information on those labels may change.

To the contrary, bombarding customers with *unnecessary* or duplicative notifications can lead to a variety of costs and harms. Every time AT&T sends a customer any type of mid-course notification of this kind, it tends to drive calls to customer care representatives. Indeed, if broadband providers are required to send direct notifications and a new label just because the speed or latency averages have changed, such mid-course notifications are much more likely to cause customer confusion or unnecessary concerns than they are to be helpful. The cost of such a requirement, therefore, goes significantly beyond the cost of sending the notification itself. AT&T must coordinate with customer care, train representatives to handle inquiries, and manage

resources to forecast and deal with increased call volumes. For all of these reasons, direct notifications to customers for label changes would do more harm than good.

**C. The Commission Should Permit Providers to Provide the Labels Digitally.**

The Commission also seeks comment on how the labels should be displayed.[43] In all cases, broadband providers should be permitted to provide the labels in some type of digital format.

At the outset, the *Notice* proposes to "require ISPs to display the labels at the point of sale," and AT&T agrees.[44] The Commission also sensibly proposes to "require providers, at a minimum, to disclose the labels of any broadband service presented to consumers on an ISP's website when a consumer browses service options."[45] The Commission asks whether "including a link is sufficient," and the answer is yes. AT&T and other providers have been providing access to their broadband information pages via a link for years under the current transparency rule, and this system has worked well. Although the new labels will present that information in a somewhat more simplified and "nutrition label" format, the 2016 labels are still significantly larger and contain much more detail than a typical FDA nutrition label, and are thus best accessed through a link.[46]

With respect to other points of sale, the Commission should require (or at least permit) digital access. Digital access, via either a QR code or an internet link, is the only cost-effective

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[43] *Notice* ¶ 26.

[44] *Id*.

[45] *Id*.

[46] Providers should have some flexibility as to where to display the link on its webpage. For example, a provider could choose to make the label easily accessible through a "modal" (*i.e.*, a kind of "pop-up" box).

way to provide access to labels that are up-to-date and accurate. Under no circumstances should broadband providers be required to provide hardcopies of the labels in retail locations.[47]

Placing a broadband label on device packaging would also be infeasible for several reasons. First, there is very limited space on packaging, which means that the proposed labels usually would not fit on the package itself and thus would have to be included inside the device package (which means the customer would have to open the package to get the information). Once the labels are placed inside the package, they cannot be updated and thus information may be out-of-date once the customer views it. By the same token, packaging can sit on shelves for a long time, so any label on the outside of the package will also likely be stale and not useful to the customer. A url or QR code with a link to the digital label would be better because the digital version could always be the most current.

And that's just the beginning. Device packaging in national retail stores is frequently locked up behind glass or has a locked plastic case around it, which would likely prevent the customer from seeing the information before the salesperson takes it out or removes the case when they are already purchasing a device. In many cases, retail salespeople do not hand a device to the customer until after they have purchased it, to prevent theft. For all of these reasons, access to the labels should be digital.

[47] *Notice* ¶ 26 (asking "[s]hould ISPs provide hardcopies of the labels in retail locations?"). In AT&T's own stores, customers should have the opportunity to view urls or disclosures about the label and customers can access our website on the tablets or devices located within AT&T and Cricket retail locations to view the information. National retail stores typically do not have tablets available for internet access, however, and thus providers would likely have to provide language in a pop-up that the salesperson would have to read to the customer during the activation flow.

### D. The Commission Should Provide a Year to Implement the New Labels.

The *Notice* proposes to give providers six months following publication of OMB approval in the Federal Register to implement the new labels, and asks whether six months is a "sufficient" amount of time.[48] It is not; the Commission should allow a year. The creation of myriad labels, and the work necessary to ensure that they are available as intended, will take more than six months. AT&T will have to create teams to develop the necessary platforms and applications, build systems to deliver the labels through multiple sales channels to cover the entire customer base, and engage in extensive training of representatives (retail, call centers, etc.) and updating of training materials, marketing documents, websites, and the like. These steps are mostly sequential and each will take several months. The Commission should therefore give providers a year to implement the new labels.

### E. The Commission Should Not Create an Enforcement Regime.

The Commission should allow providers to make all reasonable efforts to ensure compliance with the label requirements and accuracy without any enforcement. Providers should ensure that labels are updated at least once a year and as new services are offered and existing services are changed. Providers have been disclosing most of these label entries on their websites for years, and the record does not show any concerns about the accuracy of the disclosed information. The Commission should therefore retain a more "light touch" regulation approach with respect to enforcement of these requirements.

## CONCLUSION

The Commission should adopt the 2016 labels, subject to the modifications and clarifications described above.

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[48] *Notice* ¶ 33.

Respectfully submitted,

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